

### **III. REMARKS**

Claims 24-34 and 40-44, and 46-61 are pending in this application. Claims 1-23, 35-39, and 45 have been canceled. The Applicant wishes to thank the Examiner for participating in a telephone interview on June 15, 2005. Reconsideration of this application in light of the following remarks is requested.

#### **Rejections under 35 U.S.C. § 102**

Claims 24-26, 28-34, 40-41, 44, and 46-60 stand rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. 5,702,455 to Saggar ("Saggar"). Claims 24-27, 31-33, 40-44, 46-47, 49-52, 54, 55, 58, 59, and 61 also stand rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. 5,776,197 to Rabbe et al. ("Rabbe"). The PTO provides in MPEP § 2131 that

"[t]o anticipate a claim, the reference must teach every element of the claim...."

However, neither the Saggar nor the Rabbe reference disclose each element of the rejected claims.

#### **Claim 24**

Independent claim 24 recites:

A vertebral replacement implant for interposition in a space left by one or more removed vertebrae between adjacent intact vertebrae, comprising:

a tubular body having opposite ends and sized to span at least a portion of the space between the intact vertebrae;

a pair of endplate assemblies attached to each of the opposite ends of the body, each of the endplate assemblies having an end surface and a tubular portion defining a bore therethrough extending through the end surface; and

a basket disposed within at least one of the bores.

Neither the Saggar nor the Rabbe reference disclose *a basket* disposed within at least one of the bores. Specifically, neither the plate 17 of the Saggar patent nor the plate 52 of the Rabbe reference are baskets under any conventional meaning of the term. The term "basket" is certainly not a meaningless noun. According to the M.P.E.P. §2111.01 I, "[c]laims are not to be read in a vacuum, and limitations therein are to be interpreted in light of the specification in giving them their 'broadest reasonable interpretation.'" (quoting *In re Marosi*, 710 F.2d 799 (Fed. Cir. 1983)). Therefore, because plates of the Saggar and Rabbe references are not "baskets" as defined in the specification or under any other broad but reasonable interpretation, the rejection is not supported by either the Saggar or the Rabbe references and should be withdrawn.

Claim 25

Claim 25 depends from and further limits claim 24 by adding, “wherein the basket is suitable for receiving graft material.” The plate of the Saggar reference does not appear to inherently possess, nor is it described as having, the ability to receive graft material. In the phone interview of June 15, the Examiner seemed to dismiss this claim based upon the use of functional language. As the M.P.E.P at §2173.05(g) makes clear, “[t]here is nothing inherently wrong with defining some part of an invention in functional terms.” (citing *In re Swinehart*, 439 F.2d 210 (CCPA 1971)). In the cited case, the court, “even recognized in the past the practical *necessity* for the use of functional language.” *Id.* (emphasis in original).

Claim 40

Independent claim 40 recites:

A graft containment device for use with a vertebral implant having an internal cavity, the graft containment device comprising:  
a sidewall;  
an open end; and  
an engagement device for maintaining the graft containment device within the cavity of the vertebral implant.

The Saggar reference does not disclose a *graft containment* device within the internal cavity of a vertebral implant. Further, the plate 17 of Saggar is not a graft containment device with a sidewall, an open end, and an engagement device for maintaining the graft containment device within the cavity of the vertebral implant. Therefore, the rejection is not supported by the Saggar reference and should be withdrawn.

Claim 46

Independent claim 46 recites:

A tubular vertebral implant device for interposition between two vertebral endplates, the tubular vertebral implant device comprising  
a tubular assembly having a sidewall; and  
a graft containment device, having an open end, disposed in at least one end of the tubular assembly.

The Saggar reference does not disclose a *graft containment* device, having an open end, disposed in at least one end of the tubular assembly. Therefore, the rejection is not supported by the Saggar reference and should be withdrawn.

Claim 54

Independent claim 54 recites:

A method of installing a vertebral implant device, the vertebral implant device having a supporting tubular member and a graft containment device adapted to be received within a portion of the tubular member, the method comprising:

packing the graft containment device with bone growth promoting material;

positioning the graft containment device in the tubular member; and

implanting the vertebral implant device between a pair of vertebral endplates of a spine.

The Saggar reference does not disclose a graft containment device, and thus does not disclose the step of packing bone growth promoting material into the graft containment device. Furthermore, the Saggar reference does not disclose positioning the graft containment device, a device which can be packed with bone growth promoting material, in the tubular member of the vertebral implant. Therefore, the rejection is not supported by the Saggar reference and should be withdrawn.

Claim 58

Independent claim 58 recites:

An implant for interposition between a pair of vertebral bodies, the implant comprising:

first and second tubular bodies;

a connector engaged between the first and second tubular bodies;

an endplate assembly attached to at least one of the tubular bodies, the endplate assembly comprising a bore; and

a basket engaged with the endplate assembly, wherein the basket comprises a cavity adapted to extend into the bore and receive bone graft.

The Saggar reference does not disclose *a basket* engaged with an endplate assembly. Specifically, the plate 17 of the Saggar patent is not a basket under any conventional meaning of the term. Because the plate of the Saggar reference is not a "basket" as defined in the specification or under any other broad but reasonable interpretation, the rejection is not supported by the Saggar reference. Additionally, the plate of the Saggar reference does not comprise *a cavity adapted* to both *extend into the bore* of the endplate assembly and *receive bone graft*. Therefore, for at least the above reasons, claim 58 is allowable over the prior art.

Claim 59

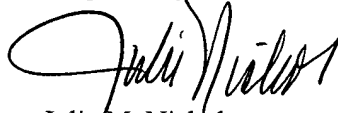
Dependent claim 59 depends from and further limits claim 58 reciting the additional limitation, "the basket further comprising a cylindrical wall bounded by a base, wherein the cavity is defined by the cylindrical wall and base." The plate of the Saggat patent clearly does not comprise a cylindrical wall and a base which define a cavity. Therefore, claim 59 is allowable over the prior art.

**IV. Conclusion**

It is clear from all of the foregoing that independent claims 24, 40, 46, 54, and 58 are in condition for allowance. Dependent claims 25-34, 41-44, 47-53, 55-57, and 59-61 depend from and further limit the independent claims and therefore are allowable as well. An early formal notice of allowance of claims 24-34 and 40-44, and 46-61 is requested.

No fees, including extension of time fees, are believed necessary for consideration of the present paper. However, if any fees, including extension of time fees are necessary, the extension of time is hereby requested, and the Commissioner is hereby authorized to charge any fees, including those for the extension of time, to Haynes and Boone, LLP's Deposit Account No. 08-1394.

Respectfully submitted,

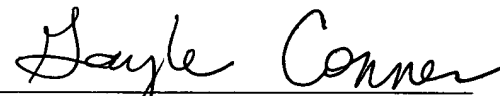


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By:   
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